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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JAMES CHARLES DUGAN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

This Court held in *United States v. Baggot*, 463 U.S. 476 (1983) ("*Baggot*") that the use of grand jury materials by the Internal Revenue Service for purposes of determining civil tax liabilities did not satisfy the criteria of "preliminarily to a judicial proceeding" required for disclosure of grand jury materials under Federal Rule of Criminal Procedure 6(e)(3)(C)(i) ("Rule 6(e)"). In *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983) ("*Sells*") this Court held that Government attorneys seeking disclosure of grand jury materials for use outside of the scope of the criminal grand jury investigation were required to obtain Rule 6(e) orders and, as a requisite to such orders, to demonstrate "particularized need" for such materials.

The questions presented herein are:

1. What effect this Court's decisions in *Baggot* and *Sells* should have upon the continuing use of grand jury materials obtained under pre-*Baggot* and *Sells* Rule 6(e) orders?

2. Whether the standards enunciated in *Baggot* and *Sells* should be applied to the prospective use of grand jury materials obtained under pre-*Baggot* and *Sells* Rule 6(e) orders?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, *In re Grand Jury Proceedings "Operation Gateway", Appeal of: James Charles Dugan,* is reported at 877 F.2d 632 (1989), and is reprinted in the Appendix hereto, Pet. App. 1a. The Memorandum and Order of the United States District Court for the Southern District of Illinois is reprinted in the Appendix hereto, Pet. App. 6a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was issued on June 22, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1988).

PERTINENT STATUTORY PROVISIONS

This case involves Federal Rule of Criminal Procedure 6 which provides in pertinent part:

> Rule 6. The Grand Jury
>
> (e) Recording and Disclosure of Proceedings.
>
> (2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribed recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.
>
> (3) Exceptions.
>
> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —
>
> (i) When so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) When permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

STATEMENT OF THE CASE

During 1980, James Charles Dugan was the subject of a grand jury investigation conducted in the United States District Court for the Southern District of Illinois entitled "Operation Gateway." Following this investigation, Mr. Dugan was indicted on November 13, 1980, for violations of 18 U.S.C. §§1961, 1962(d) and 1963 and 26 U.S.C. §§7201 and 7203 related to his 1978 Federal income tax return. (Docket No. 80-50032). As a result of plea negotiations between Mr. Dugan and the United States of America, subsequently an Information was filed charging him with violations of 26 U.S.C. §7201. The Defendant entered a plea of guilty to those charges under Count I of the indictment and the Information and was sentenced by the District Court on March 27, 1981.

The United States of America on March 17, 1981, filed an *ex parte* motion under Federal Rule of Criminal Procedure 6(e) requesting disclosure of the grand jury materials and transcripts to "Revenue Agents of the Springfield Division (of the Internal Revenue Service) and their supervisors and clerical support personnel" for use in connection with the determination of Mr. Dugan's civil Federal income tax liabilities for the years 1978

and 1979. An Order granting this motion was entered on March 17, 1981 directing:

> ...that the records and testimony occurring before the grand jury of this District, entitled "Operation Gateway", may be disclosed to and made available for inspection and use by Revenue Agents of the Springfield Division of the Internal Revenue Service, and their supervisors and clerical support personnel, for purposes of conducting a civil investigation, for tax purposes, of James Charles Dugan.

The grand jury materials were released to the Criminal Investigation Division of the Internal Revenue Service and then transferred to the Examination Division of the Springfield District for review and calculation of proposed income tax liabilities of Mr. Dugan for 1978 and 1979.

On September 15, 1981, the Internal Revenue Service issued an examination report proposing tax deficiencies and penalties due from Mr. Dugan relating to his 1978 and 1979 income tax liabilities. In calculating these deficiencies, Mr. Dugan's income and expenses for the two years in question were reconstructed utilizing the "net worth method." Under this approach, the Internal Revenue Service examined Mr. Dugan's expenditures during each of these two years and analyzed his available nontaxable funds. The difference between the expenditures and nontaxable sources was determined to have been unreported income for each of these years. These computations were based entirely and solely upon the information obtained from the grand jury materials and transcripts.

On March 4, 1983, the Internal Revenue Service issued a formal Notice of Deficiency regarding Mr. Dugan's 1978 and 1979 tax years, proposing tax deficiencies and penalties upon both years. Again, the sole basis for these computations lay in

the grand jury materials. Mr. Dugan, in response to this Notice of Deficiency, filed a Petition in the United States Tax Court contesting these liabilities on June 3, 1983.

On June 30, 1983, this Court issued opinions in *United States v. Baggot*, 463 U.S. 476 (1983) and *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983). In *Baggot* the Court held that the use of grand jury materials by the Internal Revenue Service for purposes of determining civil tax deficiencies did not satisfy the requisite "preliminarily to a judicial proceeding" under Federal Rule of Criminal Procedure 6(e) and consequently the use of such materials for civil tax liability determinations was invalid. In *Sells* the Court determined that government attorneys desiring to utilize grand jury materials outside of the scope of the criminal grand jury investigation were required to obtain a Rule 6(e) order and, as a requisite to such order, were required to show "particularized need", a standard which had previously been imposed upon private litigants moving for disclosure under Rule 6(e).

The Supreme Court's opinions in *Baggot* and *Sells* did not address the effect of these two decisions upon Rule 6(e) orders which had been issued prior to the date of these decisions, June 30, 1983, such as the Order of March 17, 1981, at issue herein.

On September 6, 1984, Mr. Dugan filed a Motion to Suppress, Deny Presumptive Correctness and Shift the Burden of Proof in the Tax Court proceedings. In this motion, Mr. Dugan contended that the Supreme Court's decision in *Baggot* should be applied retroactively to suppress the continued use in the Tax Court proceedings of the grand jury materials which had been disclosed to the Internal Revenue Service under the District Court's Order of March 17, 1981; that the ordinary presumption of correctness inuring to notices of deficiency issued by the Internal Revenue Service in the Tax Court proceedings should be denied based upon the use of this "tainted" material; and that

the burden of proof as to any deficiencies due from Mr. Dugan relating to the 1978 and 1979 tax years should be shifted to the Internal Revenue Service. On January 22, 1985, the Tax Court, citing its opinion in *Kluger v. Commissioner,* 83 T.C. 309 (1984), denied this Motion. *Dugan v. Commissioner,* 49 T.C.M. 586 (1985) At that time, no interlocutory appeal of a Tax Court decision could be filed and the case remained pending before the Tax Court.

On August 22, 1986, Mr. Dugan filed a Motion to Vacate the District Court's Order of March 17, 1981, in the United States District Court for the Southern District of Illinois requesting that the Court vacate the March, 1981 order in light of the Supreme Court's decisions in *Baggot* and *Sells.* In this Motion it was submitted that the holding in *Baggot* should be applied to deny to the Internal Revenue Service continuing access to and use of the grand jury materials in light of no apparent showing of satisfaction of the "particularized needs" standards set forth in *Sells.* This Motion was denied by the District Court by Order dated September 19, 1986.

On October 8, 1986, a Notice of Appeal to the District Court's Order of denial was filed and appeal taken to the United States Court of Appeals for the Seventh Circuit. (Docket No. 86-2705) While this appeal was pending, the Seventh Circuit Court of Appeals issued its decision in *In re Basic Earth Science Systems, Inc.,* 821 F.2d 1290 (7th Cir. 1987) *("Basic Earth Science").* This case was essentially on point with the issue involved in the appeal from the District Court's order. In *Basic Earth Science,* the Seventh Circuit Court of Appeals held that *Baggot* and *Sells* would not be applied retroactively. However, the Court recognized the inherent equitable authority of the District Court in reviewing Rule 6(e) orders and found that such orders might be vacated if the challenging party was able to carry the substantial burden of showing exceptional circumstances or that failure to

vacate such an order would result in an inequity upon the challenging party. Based upon its holding in *Basic Earth Science* the Court of Appeals affirmed the District Court's order denying the Motion to Vacate the Rule 6(e) order of March, 1981. *In re Grand Jury Proceedings, "Operation Gateway"*, 839 F.2d 390 (7th Cir. 1988). However, the Court further noted that this decision did not preclude Mr. Dugan's future challenge of this Rule 6(e) Order based upon the standards ennunciated in *Basic Earth Science. In re Grand Jury Proceedings, "Operation Gateway"*, 839 F.2d 390 (7th Cir. 1988)

On February 17, 1988, the Tax Court issued an opinion in *Hajecate v. Commissioner,* 90 T.C. 280 (1988). In this decision, the Tax Court distinguished its earlier opinion in *Kluger v. Commissioner,* 83 T.C. 390 (1984), and held that the Internal Revenue Service was precluded from continuing access to and use of grand jury materials disclosed under pre-Baggot Rule 6(e) orders in connection with pending Tax Court proceedings. While Baggot and Sells would not be applied retroactively, the Court found that the Service would not be allowed continuing or prospective use of these materials absent a showing of "particularized need" and obtaining of a valid Rule 6(e) order.

Following this decision in *Hajecate v. Commissioner,* supra, Mr. Dugan filed a Motion for Determination of Respondent's Access to Grand Jury Materials in the Tax Court proceeding, citing the Tax Court's recent opinion in *Hajecate v. Commissioner,* supra, and requesting that the Internal Revenue Service be precluded from further use or disclosure of grand jury materials pursuant to the District Court's order of March 17, 1981. On September 29, 1988, the Tax Court granted Mr. Dugan's motion and barred the Internal Revenue Service's continuing use of those materials absent a new and valid Rule 6(e) order.

Following this order the United States of America filed an *ex parte* motion in the District Court requesting disclosure of the subject grand jury materials to attorneys for the Internal Revenue Service in connection with the pending Tax Court proceedings. The District Court entered an order granting this motion on October 11, 1988. Mr. Dugan filed a Motion to Vacate that Rule 6(e) Order contending that the Government had failed to demonstrate and satisfy the criteria of "particularized need" mandated under this Court's decision in *Sells* and *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987) and that the *ex parte* nature of the proceedings was inequitable in light of Mr. Dugan's previous challenges to the use of the subject grand jury materials.

On November 4, 1988, the District Court entered a Memorandum and Order denying the Motion to Vacate. Pet. App. 6a. The Court noted that the Government had demonstrated particularized need based upon the time which had passed since the grand jury materials had been obtained; the difficulty in recreating these materials if the Government were not granted access to them; the need for these materials in the pending Tax Court proceedings; the minimal damage from inadvertent disclosure; and the limited authorization granted under the Rule 6(e) Order. Pet. App. 10a. The Court further found that the *ex parte* hearing on the Rule 6(e) Motion was within the discretion of the Court and necessary in light of the secrecy to be accorded grand jury materials. Based upon these findings, the District Court denied the Motion to Vacate.

An appeal was filed to the United States Court of Appeals for the Seventh Circuit. Jurisdiction of the Court of Appeals was established under 28 U.S.C. §1981. Jurisdiction of the District Court was based upon the issue constituting a Federal question under 28 U.S.C. §1331.

On appeal from the District Court's denial of the Motion to Vacate, Mr. Dugan contended that the District Court erred in denying the Motion because the Government had failed to satisfy the standards set forth by this Court in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983) and *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987) and the Seventh Circuit decisions in *In re Grand Jury Proceedings, Miller Brewing Co.*, 687 F.2d 1079 (7th Cir. 1982) and *Lucas v. Turner*, 725 F.2d 1095 (7th Cir. 1984). Citing the guidelines of these cases, it was contended that the Government had failed to demonstrate that release of the subject grand jury materials was necessary to avoid an injustice in another judicial proceeding; that the Government had failed to demonstrate that the need for disclosure was greater than the need for continuing secrecy; and that the Government's request was not structured to cover only material needed in the pending litigation.

The Court of Appeals for the Seventh Circuit, citing its decision in *In re Grand Jury Proceedings, "Operation Gateway"*, 839 F.2d 390 (7th Cir. 1988) held that under that opinion, Mr. Dugan's only recourse to challenge the continuing use of the grandjury materials under the 1981 Rule 6(e) Order was to return to the District Court to challenge the scope of use authorized by the District Court in the 1981 Order. Based upon this prior decision, the Court of Appeals found that the Tax Court had no authority to bar the continuing use of the Grand Jury materials and consequently there was no requirement for the Government to obtain the Rule 6(e) Order in October, 1988. Nonetheless, the Court of Appeals found that the Government had, in filing the Rule 6(e) Motion in October, 1988, failed to satisfy the requirementsof "particularized need" and that the District Court had erred in authorizing disclosure of the grand jury materials absent this demonstration of particularized need. Pet. App. 3a.

Based upon its finding that the 1988 Rule 6(e) Order was unnecessary and in light of the continuing validity of the 1981 Order, the Court went on to review the scope of authorization of the 1981 Order. The scope of this order was relevant in determining whether the 1981 Order authorized the continuing use of the subject grand jury materials in the pending litigation. This review was initiated by the Court of Appeals despite the fact that this question had not been raised by either party in the proceedings nor had it been directly addressed by the District Court in its opinion upon the Motion to Vacate.

The Court of Appeals inferred from the District Court's order and accompanying narrative that "had Dugan asked the District Court to interpret its 1981 order, it would have said that the I.R.S. may employ the documents in litigation." Thus interpreting the District Court's opinion as "clarification of the 1981 turnover order" the Court of Appeals held that the Internal Revenue Service was entitled to use the grand jury materials in its possession to conduct the pending litigation in the Tax Court. Pet. App. 4a.

REASONS FOR GRANTING THIS PETITION

A review on Writ of Certiorari should be granted in this case in order to resolve a conflict between several Circuit Courts of Appeals concerning the effect of this Court's decisions in *United States v. Baggot,* 463 U.S. 476 (1983) and *United States v. Sells Engineering, Inc.,* 463 U.S. 418 (1983) upon Rule 6(e) orders issued prior to the date of those decisions.

Furthermore, the opinion of the Court of Appeals in this case serves to allow the Internal Revenue Service to continue to use

and disclose grand jury materials without demonstrating "particularized need" despite this Court's holding in *Sells*. The Court of Appeals for the Seventh Circuit should apply the law as interpreted by this Court in *Baggot* and *Sells* in reviewing the continuing, prospective use of grand jury materials.

I. THE HOLDING OF THE COURT BELOW THAT PRE-*BAGGOT* AND *SELLS* RULE 6(e) ORDERS SHOULD NOT BE VACATED PROSPECTIVELY IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

In *Sells*, this Court, noting the long-established precepts regarding grand jury secrecy and the underlying reasons therefor, held that Government attorneys were required to demonstrate "particularized need" under standards previously applied to private litigants seeking disclosure of grand jury materials for use in civil proceedings under Rule 6(e). 463 U.S. at 442-446. This criteria of "particularized need" as applied to Government attorneys was further reviewed by this Court in *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987).

Prior to this Court's decision in *Sells*, the Government in most instances obtained grand jury materials under Rule 6(e) orders without any demonstration of particularized need. Following this Court's decision in *Sells*, several Courts have been faced with the issue of the applicability of the *Sells* standards to the continuing use of grand jury materials originally obtained by Governmental agencies under pre-*Baggot* and *Sells* Rule 6(e) orders. While most courts have held that *Baggot* and *Sells* should not be applied retroactively to invalidate Rule 6(e) orders issued prior to the date of those opinions, the Courts have differed as to the effect of those standards on the continuing availability of grand jury materials under orders which clearly did not satisfy the standard of particularized need set forth in *Sells*.

Applying those standards set forth in *In re Basic Earth Science Systems, Inc.*, 821 F.2d 1290 (7th Cir. 1987) (*"Basic Earth Science"*), the Court of Appeals for the Seventh Circuit in the instant case held that the 1981 Order authorizing disclosure of the grand jury materials to the Internal Revenue Service authorized the current use of those materials in the pending Tax Court litigation. Pet. App. 4a. In *Basic Earth Science*, 821 F.2d 1290 (7th Cir. 1987), the Court held that pre-*Baggot* and *Sells* Rule 6(e) orders were final at the time of issuance and consequently the continuing use and disclosure of those grand jury materials was not subject to the requisites set forth by this Court in *Baggot* and *Sells*, unless the intended use was beyond the scope of authorized disclosure in the original order or the taxpayer could make "a showing of exceptional circumstances" in which case the District Court might exercise its "inherent equitable power" to vacate or modify such order. 821 F.2d at 1292-1293. Under this holding, so long as the original 6(e) order was valid and the intended use lies within the scope of such order, the Government is not required to demonstrate "particularized need" for the continuing use of the grand jury materials under a pre-*Baggot* order, even though no such need had been demonstrated in the original application for the Rule 6(e) order. This is so, regardless of the time or breadth of such continuing use. A taxpayer's sole basis to challenge such an order would lie in an action in the District Court alleging that the use now sought by the Internal Revenue Service was beyond the scope of the original order or that the "failure to vacate or modify the judgment would 'work an injustice or constitute a grievous wrong'." (citing cases). 821 F.2d at 1293. Based upon this criteria, the Court of Appeals reviewed the 1981 order in the instant case and found that the use of the grand jury materials in the Tax Court proceedings was so authorized.

The Seventh Circuit's determination of the inapplicability of this Court's decisions in Baggot and Sells to prospective use of grand jury materials conflicts with the holdings of other Circuit Courts of Appeals which have considered this question.

In *In re Grand Jury Proceedings (Henry Kluger, Deceased)*, 827 F.2d 868 (2nd Cir. 1987), the Court of Appeals for the Second Circuit considered the question of prospective application of *Baggot* and *Sells* and the continuing disclosure of grand jury materials under pre-*Baggot* Rule 6(e) orders. It was acknowledged that the Government had not demonstrated "particularized need" in obtaining the order therein. The Court, citing this Court's opinion in *Sells* noted:

> Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has been lost but we can grant partial relief by preventing further disclosure. 827 F.2d at 873 (2nd Cir. 1987) (quoting *Sells*, 463 U.S. at 422-423 n.6).

Based upon this analysis of the continuing harm arising from the disclosure of grand jury materials, the court upheld the District Court's determination that the continuing, prospective use of such materials would require that the Government obtain a new Rule 6(e) order and satisfaction of those criteria of particularized need set forth by this Court. While the Second Circuit assumed that *Baggot* and *Sells* would not be applied retroactively to invalidate pre-*Baggot* Rule 6(e) orders or negate the disclosures to date under the authority of such orders, the Court held that the prospective use of these materials would constitute continuing disclosures and any such future uses would be subject to the standards enunciated in *Sells*.

Similarly, the Ninth Circuit Court of Appeals in *In re Sells*, 719 F.2d 985 (9th Cir. 1983) held that while *Baggot* and *Sells* would not be applied retroactively,

> The general rule is that an appellate court should apply the law as it stands on the date of the appellate decision. See *Thorpe v. HousingAuthority*, 393 U.S. 268, 281-83 (1969); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

In re Sells, 719 F.2d at 990.

The Ninth Circuit further noted in *In re Sells* that although it could not restore the secrecy of the grand jury materials that had already been lost, "...the disclosure order contemplates increasingly broad distribution of materials as the stages of administrative and potentially, judicial proceedings progress." *In re Sells*, 719 F.2d at 990. Citing this Court's decision in *Sells*, the court noted that such disclosures would constitute "a continued and increasingly wide breach of grand jury secrecy." 719 F.2d at 990. Noting that such disclosures would violate the enunciated standards of *Baggot* and *Sells*, the Court of Appeals invalidated the Rule 6(e) order at issue and directed that the Government must make a showing of particularized need in order to obtain future use of the grand jury materials.

The Fourth Circuit Court of Appeals has held that *Baggot* and *Sells* will not be applied retroactively to prohibit the use of grand jury material which was fully disclosed pursuant to a valid Rule 6(e) order issued before this Court's opinions in *Baggot* and *Sells*. *United States v. (Under Seal)*, 783 F.2d 450 (4th Cir. 1986), cert. denied sub nom. *Raven's Hollow Ltd. v. United States*, 481 U.S. 1032 (1987). However, in a dissent filed in *United States v. (Under Seal)*, Judge Butzner, citing this Court's opinion in *Sells*, 463 U.S. at 422 n.6, noted that the Government's continued access to and use of the grand jury

materials after a change in the applicable law constitutes a disclosure which should be held subject to the then existing standards of "particularized need". *United States v. (Under Seal)*, 783 F.2d at 453-454.

The United States Tax Court, citing the Second Circuit's decision in *In re Grand Jury Proceedings: (Henry Kluger, Deceased)* held that *Sells* should be applied prospectively to prohibit the Government's continued access to grand jury materials for use in Tax Court proceedings absent the issuance of a new, valid Rule 6(e) order based upon a demonstration of particularized need by the Government in light of the standards set forth in *Sells*. *Hajecate v. Commissioner*, 90 T.C. 280 (1988).

Finally, the Third Circuit Court of Appeals has applied a different standard regarding the applicability of *Baggot* and *Sells* to the continuing use of grand jury materials under pre-*Baggot* and *Sells* Rule 6(e) orders. Analyzing the issue in light of this Court's decisions in cases involving retroactive application of the exclusionary rule to suppress evidence, the Third Circuit Court of Appeals has held that if Government agents acted in good faith reliance upon facially valid Rule 6(e) orders, the evidence obtained therefrom would not be suppressed in subsequent judicial proceedings in which the Government sought to utilize such evidence. *Graham v. Commissioner*, 770 F.2d 381 (3rd Cir. 1985); *Gluck v. United States*, 771 F.2d 750 (3rd Cir. 1985); *Caprio v. Commissioner*, 787 F.2d 109 (3rd Cir. 1986).

Thus, there is a conflict between the Circuit Courts of Appeal regarding the scope and application of this Court's decisions in *Baggot* and *Sells* to the continuing use of grand jury materials obtained under pre-*Baggot* and *Sells* Rule 6(e) orders. The granting of a Writ of Certiorari in this matter would provide the opportunity to resolve this conflict of interpretation.

II. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT ERRED IN ITS REFUSAL TO GIVE PROSPECTIVE EFFECT TO THE SUPREME COURT'S DECISIONS IN *BAGGOT* AND *SELLS*.

In *In re Basic Earth Science Systems, Inc.*, 821 F.2d 1290 (7th Cir. 1987), *In re Grand Jury Proceedings: "Operation Gateway" (James Charles Dugan)*, 839 F.2d 390 (7th Cir. 1988) and in that opinion at issue herein, the Seventh Circuit has refused to apply this Court's decisions in *Baggot* and *Sells* retroactively. In addition, the Court of Appeals has refused to apply the standards set forth in those decisions to the continuing use of grand jury materials despite the fact that the disclosure of such materials was made pursuant to orders which admittedly failed to satisfy the criteria of "particularized need" set forth by this Court in Sells. It is submitted that these holdings are in error.

As this Court noted in *Sells*, 463 U.S. at 422 n.6:

> Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has been lost but we can grant partial relief by preventing further disclosure. (Quoting *In re Grand Jury Investigation (Sells, Inc.)*, 642 F.2d 1184, 1188 (9th Cir. 1981).)

There is no dispute that the use of the grand jury materials to develop the proposed tax deficiencies against Mr. Dugan regarding his 1978 and 1979 tax years would now be prohibited in light of this Court's decision in *Baggot*. Assuming arguendo that the decision in *Baggot* does not apply retroactively to bar the fruits or results of the use of such materials prior to this Court's decisions therein, the issuance of the notice of defi-

ciency by the Internal Revenue Service resulting in the Petition filed by the taxpayer to the Tax Court is not subject to challenge. However, there is no apparent dispute that the Government did not demonstrate "particularized need" to the District Court in obtaining the 1981 Rule 6(e) order. Consequently, the standards enunciated in *Sells* and further developed in this Court's opinion in *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987) have never been satisfied by the Government in connection with the use of the grand jury materials at issue herein. While, as noted above, it may be impossible to cure the disclosures made to date, the continuing access to these materials for use in the Tax Court proceedings constitutes "disclosure". It is submitted that upon challenge by the taxpayer, such disclosure should be subject to the extant standards at the time of intended usage.

The general rule is that an appellate court should apply the law as it stands on the date of that appellate decision. See *Thorpe v. Housing Authority*, 393 U.S. 268 at 281-83 (1969); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, at 110 (1801); *In re Sells*, 719 F.2d 985, at 990 (9th Cir. 1983). Under this precept, the Seventh Circuit Court of Appeals, in reviewing the question of the availability of grand jury materials under pre-*Baggot* and *Sells* Rule 6(e) orders should have applied the standards set forth by this Court in *Sells* to the continuing disclosure of such materials. Based upon this standard, the Government should have been directed to apply for a new Rule 6(e) order and demonstrate satisfaction of the standards of particularized need in order to have continued access to and use of the grand jury materials. While there is an exception to this general rule where a "manifest injustice" would result (see *Bradley v. School Board of Richmond*, 416 U.S. 696, 717 (1974)), the prospective application of the "particularized need" standard of *Sells* would not result in such a manifest injustice. By applying the *Sells* standards prospectively, the Court would not "undo" the Government's prior usage of these materials in

developing the proposed tax liabilities. Rather, the Government would simply be required to satisfy those standards of particularized need in order to have continued access to these materials for use in the presentation of its case in the Tax Court. As noted by this Court in *Sells,* 463 U.S. at 422 n.6, while it is impossible to cure prior breaches of disclosure, the continuing use of these materials represents further disclosure. Such future disclosures should be subject to current standards.

In *Basic Earth Science* the Court of Appeals for the Seventh Circuit held that Rule 6(e) orders issued prior to this Court's decisions in *Baggot* and *Sells* were final judgments at the time of issuance. While acknowledging that a Court will apply a new rule or judicial interpretation of law to a pending matter, even if the case is on appeal, once a civil judgment has become final it remains binding regardless of any subsequent change in the law. (citing cases) 821 F.2d at 1292-1293. Based upon the finality of Rule 6(e) orders (despite the fact that in many instances they were issued in *ex parte* proceedings and the taxpayer may have only become aware of such orders years after the date of issuance) the Court refused to vacate or modify such orders or require that the standards of *Sells* be imposed upon future use of materials obtained thereunder.

However, this Court has held that a Court should modify the prospective effect of an order when later statutory changes or decisions clarify that the actions authorized by such order are prohibited by law. See *System Federation No. 91 v. Wright,* 364 U.S. 642 (1961); and *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561 (1984). As this Court noted in *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561 at 576 n.9:

> In recognition of this principle, this Court in *Wright* held that when a change in the law brought the terms of a decree into conflict with the statute pursuant to which

the decree was entered, the decree should be modified.

In *Sells* this Court acknowledged the long-held precept of grand jury secrecy. 463 U.S. 416 at 424-425. As the Court noted in discussing grand jury secrecy:

> Both Congress and this Court have consistently stood ready to defend it against unwarranted intrusion. In the absence of a clear indication in a statute or rule, we must always be reluctant to conclude that a breach of this secrecy has been authorized. See *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 572-573, 75 L.Ed.2d 281, 103 S.Ct. 1356 (1983). 463 U.S. 416 at 425.

Recognizing this sacrosanctity of grand jury proceedings, the Court applied the standard of particularized need to Government agencies seeking disclosure of grand jury materials.

While the 1981 Rule 6(e) order at issue in the instant case may have been valid at the time of issuance, the subsequent decision of this Court in *Sells* established different criteria for the issuance of such orders. The effect of this order, under the Seventh Circuit holding herein, is to allow the continuing use of grand jury materials by the Internal Revenue Service in the pending Tax Court litigation. This continuing use constitutes further disclosure. The March, 1981 Rule 6(e) order should have been vacated in light of this Court's decision in *Sells* and any future order for the use of such materials should require the demonstration of particularized need to the District Court.

Such a standard would follow the guidelines adopted by the United States Court of Appeals for the Second Circuit and Ninth Circuit and the United States Tax Court. *In re Sells*, 719 F.2d 985 (9th Cir. 1983); *In re Grand Jury Proceedings (Henry Kluger, Deceased)*, 827 F.2d 868 (2nd Cir. 1987); *Hajecate v. Commissioner*, 90 T.C. 280 (1988).

CONCLUSION

For the reasons set forth hereinabove, it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 89-1055
In the Matter of:
GRAND JURY PROCEEDINGS "OPERATION GATEWAY"

Appeal of:
JAMES CHARLES DUGAN

Appeal from the United States District Court for the Southern District of Illinois, Alton Division. No. 81-20 E-William D. Stiehl, Judge.

ARGUED MAY 30, 1989-DECIDED JUNE 22, 1989

Before CUDAHY, FLAUM, and EASTERBROOK, Circuit Judges.

EASTERBROOK, *Circuit Judge.* Back for a second bite at the apple is James Charles Dugan, who when last here, 839 F.2d 390 (1988), failed to persuade us that *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), applies retroactively. In 1981 the district court authorized the IRS to have and use information a grand jury had assembled about Dugan. Indictments charged Dugan with tax evasion, failure to file tax returns, and violations of RICO; he pleaded guilty. On the civil side, the IRS issued a deficiency notice concerning Dugan's 1978 and 1979 taxes. After the Tax Court refused to forbid use of the evidence gathered by the grand jury, *Dugan v. CIR*, 49 T.C.M. 586 (1985), Dugan asked the district court and then us to ban its further use without a determination of "particularized need" under Fed. R. Crime. P. 6(e). *In re Basic Earth Science Systems, Inc.*, 821 F.2d 1290 (7th Cir. 1987), holds that *Sells* does not apply to the future use of materials obtained before

Sells under the practice prevailing in this circuit. Although *Earth Science* meant that Dugan could not block future uses authorized by the turnover order of 1981, we observed: "Nothing...prevents Dugan from asking the district court to rule on whether the IRS is exceeding the scope of the order by seeking to use the materials in the Tax Court proceedings." 839 F.2d at 392.

Whether use (meaning disclosure) of the documents in litigation had been authorized in 1981 is debatable, as the 1981 order allowed disclosure "for purposes of conducting a civil investigation, for tax purposes, of James Charles Dugan." Dugan might have asked the district court to hold that this did not encompass evidentiary use in litigation. He didn't. Instead he asked the Tax Court to grant what we had denied: an order forbidding the government to use the documents unless it demonstrated particularized need. the Tax Court obliged. It issued an order on September 29, 1988, providing (emphasis added):

[I]n the absence of an order duly issued under Rule 6(e) of the Federal Rules of Criminal Procedure by the United States District Court for the Southern District of Illinois specifically authorizing such disclosure or use respondent [the Commissioner of Internal Revenue] shall not disclose or use in the preparation or trial of this case any materials heretofore obtained by respondent or his agents from the grand jury in the matter entitled In re Grand Jury Proceedings "Operation Gateway" and James Charles Dugan, Docket no. Misc. 81-20-E.

The Tax Court described our suggestion that Dugan visit the district court to obtain clarification of the scope of the 1981 order as "merely an alternative to the motion filed by [Dugan] for a protective order."

The Tax Court's order cannot be reconciled with our decision that the Commissioner is entitled to use the documents in the future. The only future use contemplated was use in litigation, and the only reason Dugan had come to the district court and this court-after he had failed to persuade the Tax Court-was the impending introduction of the materials in civil proceedings. We held open the possibility that evidentiary use had not been authorized in 1981, and we told Dugan to return to the district court if he wanted clarification. Dugan had no business seeking, and the Tax Court no authority to issue, an order disagreeing with our conclusion that the Internal Revenue Service may continue to use the documents in preparing for civil litigation.

Nonetheless, instead of asking us to review the Tax Court's decision (as by mandamus to enforce our judgment), the IRS meekly asked the district court for the Rule 6(e) order we had held it did not need. The court made a finding of particularized need, which Dugan asks us to overturn. The district court explained its decision this way:

The Court cannot ignore the fact that this material has been available to the Commissioner since 1981. Clearly, barring the government from the ability to continue to use this material would significantly, if not detrimentally, affect the agency's ability to recoup taxes that may be due and owing from Dugan. Additionally, the IRS has shown a sufficiently great need for access to this material in order to avoid the unnecessary and arduous task of recreating the voluminous materials in order to effectively proceed before the Tax Court....To require the IRS to attempt to reconstruct this seven-year-old grand jury investigation is unwarranted under these circumstances.

This falls short of "particularized need". The IRS did not argue to the district court, and does not maintain here, that it would be unable to assemble the documents it needs. It argues only that it would be inconvenient and time-consuming to do so-which the district court thought pointless, given that the IRS has had its mitts on the materials for eight years. Inconvenience, delay, even silliness, do not add up to "particularized need", a demanding standard. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); Lucas v. Turner, 725 F.2d 1095 (7th Cir. 1984). Surely the Tax Division of the Department of Justice would demand more before turning over materials gathered by a grand jury in a criminal tax investigation. The long-run interests of law enforcement would not be served by a decision that the paltry showing the IRS made here is "particularized need".

Because we held in 1988 that the IRS does not have to show "particularized need" to use the materials in ways approved in 1981, the absence of "particularized need" does not lead to reversal. We infer from the district court's order and accompanying narrative that had Dugan asked the district court to interpret its 1981 order, it would have said that the IRS may employ the documents in litigation. The district court's statement that "The Court cannot ignore the fact that this material has been available to the Commissioner since 1981. Clearly, barring the government from the ability to continue to use this material would significantly, if not detrimentally, affect the agency's ability to recoup taxes that may be due and owing from Dugan" demonstrates as clearly as need be that it would have permitted the IRS to deploy in the Tax Court the fruits of the 1981 order.

Interpreting the district court's opinion as clarification of the 1981 turnover order, we hold that the IRS is entitled to use the

grand jury materials in its possession to conduct the pending litigation in the Tax Court, including introducing the materials into evidence. Our 1988 decision, and this one, are preclusive between the parties, and if necessary we will enjoin Dugan from attempting to contradict these decisions in any other forum.

AFFIRMED

A true Copy:
Teste:

_____
Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: **MISC. NO. 81-20-E**

GRAND JURY PROCEEDINGS
"OPERATION GATEWAY"

MEMORANDUM AND ORDER

STIEHL, District Judge:

This matter is before the court on movant, James Charles Dugan's (Dugan), Motion to Vacate this Court's Amended Order of October ll, 1988. In the Amended Order the Court, upon a finding of particularized need and that the documents and transcripts would be used by the Commissioner of the Internal Revenue Service in connection with litigation pending in the united States Tax court in the case of James Charles Dugan v. Commissioner of Internal Revenue, No. 13588-83, permitted disclosure to the government of documents and transcripts of the "Operation Gateway" grand jury, and allowed the government use of the materials in the Dugan Tax Court litigation, pursuant to **Fed. R. Crim. P. 6(e).**

BACKGROUND

Dugan was the subject of a grand jury investigation in 1980 in the Southern District of Illinois in connection with a drug network known as "The Company." Dugan was indicted in November of 1980, and entered his plea of guilty to one count of the indictment, as well as to one count of an information charging him with income tax evasion.

On March 21, 1981, Chief Judge James L. Foreman, acting on an ex parte government motion, permitted disclosure to the Internal Revenue Service District Counsel of the grand jury records and transcripts for use in determining Dugan's tax liabilities for the years 1978 and 1979. A Notice of Deficiency was issued by the IRS in March of 1983, and Dugan filed a petition in the United States Tax Court contesting the assessed liabilities in June of 1983.

In August of 1986, based on the Supreme Court's rulings in **United States v. Baggot, 463 U.S. 476 (1983)** and **United States v. Sells Eng'g Inc., 463 U.S. 418 (1983),** Dugan filed a motion to vacate the Court's order of March, 1981, and upon its denial, filed an appeal with the Seventh Circuit. The Seventh Circuit denied Dugan's appeal on February 8, 1988. In its ruling, the court cited **In re Disclosure of Grand Jury Materials, Basic Earth Sciences, Sept. Inc., 821 F. 2d 1290 (7th Cir. 1987),** which held that retroactive analysis under **Baggot** and **Sells** is not applicable to **Rule 6(e)** orders that were final prior to June 30, 1983. **In re: Grand Jury Proceedings "Operation Gateway ", 839 F. 2d 390, 392 (7th Cir. 1988).** Further, the court found, "Appellant's only appropriate remedy, therefore, is an independent action in equity to challenge the final order." **Id., citing Basic Earth Sciences, 821 F. 2d at 1293 n.4.**

The Tax Court determined that the grand jury materials that were disclosed by this Court pursuant to the March, 1981, Order, could not be used in the Tax Court trial without a new order from this court authorizing disclosure under **Rule 6(e).** On the morning the Tax Court trial was to begin, the government sought, ex parte, an order of this Court permitting disclosure of the grand jury materials. It is this Court's Amended Order of October 11, 1988 which the movant now seeks to have vacated.

LEGAL ANALYSIS

Federal Rule of Criminal Procedure 6(e), states, in part:

> Rule 6. The Grand Jury
>
> (e) Recording and Disclosure of Proceedings
>
> . . .
>
> (2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a Recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (e)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.
>
> (3) Exceptions.
>
> . . .
>
> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made
>
> --

> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding;
>
> . . .
>
> If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

The movant argues that the Court should vacate its Amended Order on two grounds: first, that the government failed to advise the movant of the ex parte petition, thereby denying the movant an opportunity to be heard; and, second, that the government failed to meet the requisite showing of "particularized need."

A. THE EX PARTE NATURE OF THE PROCEEDINGS

Movant argues that there was no apparent need for an ex parte motion under the circumstances of this case as Dugan is aware of the information contained in the grand jury materials.

Federal Rule of Criminal Procedure 6(e)(3)(D) provides that the court may hold an ex parte hearing on a petition for disclosure when the petitioner is the government. The 1983 Amendment Note of the Advisory Committee for the Criminal Rules reads:

> The legislative history of rule 6(e) states: "It is contemplated that the judicial hearing in connection with an application for a court order by the government, under subparagraph (e)(c)(i), should be ex parte so as to preserve, to the maximum

> extent possible, grand jury secrecy." S. Rep. No. 95-354, 1977 U.S. Code Cong. & Admin. News p.532.

Therefore, an ex parte hearing is clearly within the discretion of the Court.

The Court, in the exercise of its discretion, determined that an ex parte hearing was appropriate due to the obligation of the court to protect the secrecy of the grand jury. Although the movant argues that he is aware of the information contained therein, it is clear that he has had access only to summary schedules of the IRS examination report. The secrecy of the actual transcripts and reports was therefore properly preserved by the Court's ex parte order of October 11, 1988.

B. SHOWING OF "PARTICULARIZED NEED"

Dugan also asserts that the government failed to meet the requisite showing of particularized need as set forth in Sells, 463 U.S. at 3148. In Sells, the Supreme Court reaffirmed its earlier ruling in **Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222-23 (1979):**

> Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed .
>
> . . .

quoted in Sells, 463 U.S. at 443.

In this case, the disclosure was clearly sought to enable the IRS to properly defend in the Tax Court a challenge to a Notice of Deficiency. The court cannot ignore the fact that this material has been available to the Commissioner since 1981. Clearly, barring the government from the ability to continue to use this material would significantly. if not detrimentally, affect the agency's ability to recoup taxes that may be due and owing from Dugan.

Additionally, the IRS has shown a sufficiently great need for access to this material in order to avoid the unnecessary and arduous task of recreating the voluminous materials in order to effectively proceed before the Tax Court. The government has asserted that virtually all of its evidence in defense of the Tax Court litigation is grand jury material. The Court finds that public policy—"efficient, effective and even-handed enforcement of federal statutes"—weighs in favor of disclosure. United States v. John Doe Inc. I, 107 S.Ct. 1656, 1663 (1987).

The Court is aware that limited discovery may be available to the government under the Tax Court rules. However, the fact that these grand jury materials are at least seven years old, coupled with the fact that the IRS District counsel has had the materials for approximately seven years, and based the original determination of delinquency on the information in these materials, tips the balance in favor of disclosure. To require the IRS to attempt to reconstruct this seven-year-old grand jury investigation is unwarranted under these circumstances.

Clearly, the public benefits from disclosure outweigh the dangers associated with the release of the materials. John Doe I, 107 S.Ct. at 1663. For these same reasons, the Court is satisfied that in camera review of the materials is unnecessary.

Additionally, the Court notes that there has been no showing that the government seeks disclosure of these materials for an improper or illegal purpose.

Moreover, as the grand jury Proceedings in question have clearly been long terminated, the damage of possible inadvertent disclosure, the second consideration of Sells, is minimal at best. The risk attached when disclosure is made to governmental officials is less than when disclosure is sought by private parties. **463 U.S. at 445.**

Finally, the court is persuaded that the Amended Order is sufficiently narrow in scope to satisfy the third concern of Sells. The materials sought relate to Dugan's tax liabilities for the year 1978 and 1979, the very issue before the Tax court. This clearly is not a wholesale attempt to get disclosure of all grand jury materials in "operation Gateway." Accord Lucas v. Turner, **725 F. 2d 1095, 1108 (7th Cir. 1984).**

CONCLUSION

Upon review of the record, the court finds that the disclosure ordered by this court on October ll, 1988 was proper. Therefore, the Court **DENIES** the movant's motion to vacate.

IT IS SO ORDERED.

DATED: 4 November 1988

/s/ William D. Stiehl

DISTRICT JUDGE

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 22, 1989

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge

No. 89-1055

IN THE MATTER OF:

GRAND JURY PROCEEDINGS
"OPERATION GATEWAY"

APPEAL OF: JAMES CHARLES DUGAN

Appeal from the United States District Court for the Southern District of Illinois, Alton Division.
No. 81 GJ 20
Judge William D. Stiehl

This cause was heard on the record from the United States District Court for the Southern District of Illinois Alton Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.